[redacted] and receipt of a copy of the within is hereby admitted

this [redacted] day of November, 1939.

[redacted]

Attorney for Respondent,
Industrial Accident Commission of the
State of California.

[redacted]

[redacted]

Attorneys for Respondent,
Kenneth Fuller.

FILE COPY

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1938

No. 158

PACIFIC EMPLOYERS INSURANCE COMPANY,
Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and KENNETH TATOR,
Respondents.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

I.

COMMENT ON RESPONDENTS' STATEMENT OF FACTS.

This Court has said, in the case of *United States v. Johnston,* 268 U. S. 220, "We do not grant a certiorari to review evidence and discuss specific facts." Thus, petitioner will not attempt to dispute in great detail the facts as stated in respondents' brief. The

facts stated by petitioner are those which are stated in the opinion of the Supreme Court of the State of California, and are the only ones to be considered. It is the erroneous application of the law to said facts which is here objected to by petitioner.

However, since respondents have displayed a tendency to argue the facts, petitioner feels that it is necessary that some reply be made to the alleged facts set forth by respondents beginning at page 2 of their brief.

While it is true that Mr. Tator did work around the Oakland plant after he had determined how to perfect the process he had been sent to California to correct, this was simply because he had to wait while certain machinery was changed, and, while waiting for said machinery to be manufactured and installed, he went over other processes in the Oakland plant. At the time of his injury he was giving a final check-up to the new equipment which had been installed.

His salary and expenses were not to be paid by the Oakland branch, but it was assumed that that branch would be charged with such costs as a matter of expediency in bookkeeping, just as the salaries and expenses of other officers of the company, including Mr. Tator, were charged thereto as a part of the costs of operating said branch plant.

Nor can it be denied that Mr. Tator could have obtained medical treatment for his injury had he

applied for compensation benefits in Massachusetts, since there is a provision therefor in the Massachusetts Act*, just as there is in any workmen's compensation act.

II.

PETITIONER'S CONTENTION THAT THE MASSACHUSETTS STATUTE CONSTITUTES A SUBSTANTIVE DEFENSE HAS NOT BEEN SHOWN TO BE INCORRECT BY RESPONDENTS.

Respondents have attacked petitioner's contentions that the remedy provided by the Massachusetts Workmen's Compensation Act, *Mass. Gen. Laws, Ter. Ed., Chapter 152, Sections 24 and 26,* (App., p. iv),** is exclusive; that said Act constitutes a "substantive" defense to the present proceedings; and that, consequently, full faith and credit must be accorded said Act by the courts of the State of California, a bal-

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*Mass. Gen. Laws, Ter. Ed., Chap. 152, contains the following:

"Section 30. During the first two weeks after the injury, and, if the employee is not immediately incapacitated thereby from earning full wages, then from the time of such incapacity, and in unusual cases, or cases requiring specialized or surgical treatment, in the discretion of the department, for a longer period, the insurer shall furnish adequate and reasonable medical and hospital services, and medicines if needed, together with the expenses necessarily incidental to such services. The employee may select a physician other than the one provided by the insurer; and in case he shall be treated by a physician of his own selection, or where, in case of emergency, or for other justifiable cause, a physician other than the one provided by the insurer is called in to treat the injured employee, the reasonable cost of his services shall be paid by the insurer, subject to the approval of the department. Such approval shall be granted only if the department finds that the employee was so treated by such physician or that there was such emergency or justifiable cause, and in all cases that the services were adequate and reasonable and the charges reasonable. In any case where the department is of opinion that the fitting of the employee with an artificial eye or limb, or other mechanical appliance, will promote his restoration to industry, it may order that he be provided with such an artificial eye, limb or appliance, at the expense of the insurer."

**Appendix cited is at the end of Brief of Petitioner, dated November 14, 1938.

ancing of the interests of California and Massachusetts not being necessary in such case.

However, it is petitioner's belief that the Supreme Court of the State of California gave conviction to petitioner's contention as to the exclusiveness of the Massachusetts Act when it stated, in the opinion below, (*Pacific Employers Insurance Company v. Industrial Accident Commission,* 10 Cal. (2d) 567, at page 575):

> "In considering the application of these and other cases to the right of Mr. Tator to recover compensation in California, it is important to note that the Supreme Court of Massachusetts has decided that in the administration of the workmen's compensation law, the Industrial Accident Commission and the courts of that state are not bound by the acts of any other jurisdiction and that a proceeding brought in another state by an employee hired in Massachusetts 'has no standing in law'. (Migues' Case, 281 Mass. 373 (183 N. E. 847); McLaughlin's Case, 274 Mass. 217 (174 N. E. 338).) * * *"

Respondents have stated (Brief of Respondents, page 17): "The rule applicable to 'substantive' defenses is only that such a defense must be considered by the Court of the forum and may not be disregarded merely because it conflicts with the law of the forum." The case of *John Hancock Mutual Life Ins. Co. v. Yates,* 299 U. S. 178, (erroneously cited by respondents as 299 U. S. 129), is said by respondents to support such a rule. But, the rule of the case would

seem to be otherwise. In that case a Massachusetts corporation insured the life of Herman Yates, agreeing to pay upon his death $2,000 to his wife. The policy was applied for, issued and delivered, in New York, where he and his wife resided. Yates died in New York and thereafter his wife moved to Georgia and brought suit there on the policy. The Company proved that the deceased had made misstatements in his application for the policy, and further proved that, under the law of New York, the misstatements made were material misrepresentations which avoided the policy. A New York statute providing that in case a false answer to a material question is not corrected, the applicant cannot recover, was entered in defense. Your Honorable Court held that the declaration by the statute, as construed and applied by the highest court of New York, avoided the policy and determined the substantive rights of the parties as fully as if a provision to that effect had been embodied in writing in the policy, and that to refuse to give that defense effect would irremediably subject the Company to liability. The case of *Bradford Electric Light Co. v. Clapper,* 286 U. S. 145, 160, was cited as authority for this decision.

Thus, it has been established by your Court that, while a state may, on occasions, decline to enforce a cause of action arising out of a statute of another state, it may not, under the full faith and credit clause, refuse to give effect to a substantive defense under the applicable law of another state.

The cases of *Bradford Electric Light Co. v. Clapper,* 286 U. S. 145, and *John Hancock Mutual Life Ins. Co. v. Yates,* 299 U. S. 178, clearly indicate what your Court considers "a substantive defense under the applicable law of another state" to be. It should be sufficient for present purposes that the Massachusetts statute here concerned is identical in principle to the statute of Vermont considered in the *Bradford Light* case, and which was there held to constitute a "substantive" defense under the applicable law of Vermont. In the case at bar, as in the *Bradford Light* case and the *Hancock Insurance Co.* case, the statute of the foreign state would absolutely determine the substantive rights of the parties were the action brought in the foreign state. We may well say, as did your Court in the *Hancock Insurance Co.* case, (at page 183), "To refuse to give that defense effect would irremediably subject the Company to liability." Or, as the California Supreme Court said in the opinion below: "If the employee may disregard the law of the state of his residence and employment and assert his rights in another jurisdiction, an employer may be required to pay compensation in an amount different from that for which he would be liable under the lex loci." That, of course, would irremediably subject the employer to liability. (R. 71.)

There is not the danger here of which your Court expressed fear in the case of *Alaska Packers Assn. v. Ind. Acc. Com.,* 294 U. S. 532, when it said, at page 547 thereof:

> "A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own."

In the case at bar, had the action been brought in Massachusetts, the Massachusetts court would have been precluded, by the very terms of the Workmen's Compensation Act of that state, from giving effect to the California statute, even though the injury occurred in California. Effect would have been given to the Massachusetts Act. (*Migues' Case,* 281 Mass. 373, 183 N. E. 847; *McLaughlin's Case,* 274 Mass. 217, 174 N. E. 338; *Pederzoli's Case,* 269 Mass. 550, 169 N. E. 427.) Massachusetts has power, through its own tribunals, to grant compensation to local employees, locally employed, for injuries received outside its borders (compare *Quong Ham Wah Co. v. Ind. Acc. Com.,* 255 U. S. 445, dismissing writ of error, 184 Cal. 26).

III.

EVEN IF IT BE ADMITTED THAT THE MASSACHUSETTS ACT DOES NOT CONSTITUTE A SUBSTANTIVE DEFENSE UNDER MASSACHUSETTS LAW, THE DECISION OF THE CALIFORNIA COURT IS CONTRARY TO LAW AND IS NOT SUPPORTED BY THE FACTS.

Reduced to simple terms, it is the contention of petitioner that the case of *Bradford Electric Light*

Co. v. Clapper, supra, is controlling in the decision of this case, while respondents contend that the doctrine of the case of *Alaska Packers Assn. v. Ind. Acc. Com.,* supra, is controlling. However, it must be remembered that petitioner has also contended that, even if the governmental interest of each jurisdiction be assessed in accordance with the doctrine of the *Alaska Packers* case, the superior interest must be held to be in Massachusetts (Brief of Petitioner, pages 19, et seq.). We have, in so doing, maintained our burden of proof, if such burden there be.

At any rate, this matter is now before your Court, and it is for your Court to determine whether or not petitioner has maintained this burden of proof. It cannot be claimed that, because the California court has given expression to its public policy, such factor alone is sufficient to determine the California jurisdiction. Your Court has repeatedly held that, in cases concerning the full faith and credit clause, it is for it to determine whether the statute of the foreign state should be accorded full faith and credit. (*Supreme Council, R. A. v. Green,* 237 U. S. 531; *Aetna Life Ins. Co. v. Dunken,* 266 U. S. 389.)

In consideration of the governmental interest of the two jurisdictions in this matter, we would like to paraphrase part of a quotation given by respondents from the *Alaska Packers Assn.* case wherein your Court was discussing the *Bradford Light* case. Said quotation is set forth at page 15 of respondents' brief.

> "* * * In reaching that conclusion, weight was given to the following circumstances: That lia-

bility under the *Massachusetts* act was an incident of the status of the employer and employee created within *Massachusetts,* and, as such, continued in *California* where the injury occurred; * * *; that the *Massachusetts* statute expressly provided that it should extend to injuries occurring without the state and was interpreted to preclude recovery by proceedings brought in any other state; and that there was no adequate basis for saying that the compulsory recognition of the *Massachusetts* statute by the courts of *California* would be obnoxious to the public policy of that state."

IV.

RESPONDENT TATOR'S EMPLOYMENT HAD NOT BEEN GIVEN A LOCUS IN CALIFORNIA, BUT, EVEN IF IT HAD, IT WOULD NOT BE MATERIAL TO THE DECISION OF THIS CASE.

Respondents have submitted that, in addition to the public policy of California, there are other circumstances in the case which show that California has a governmental interest equal to or greater than that of Massachusetts. (Respondent's Brief, p. 32.) In addition to the occurrence of the injury in California, it is considered important by respondents that, as they contend, the employee-employer status had been given a locus in California, and that Mr. Tator, or members of his class, might have to resort to public charity if denied the benefits of the California law.

We do not concede that an employee-employer locus had been given a locus in California. The determinative facts are set forth by the California Supreme Court in the opinion below (10 Cal. (2d) 567, 576), in the following language:

> "At the time of his injury, Mr. Tator was a resident of Massachusetts. He was employed there, and was subject to the direction of officers of the employer there located. His salary was paid to him in that state, and he had come to California only on a specific errand for his employer."

Also, see Answer to Petition for Hearing in the Supreme Court of the State of California (R. 115), which, with the opinion of the California Supreme Court, shows that Mr. Tator was considered, at no time, an employee of the Oakland branch of his employer. This directly refutes respondents' contention.

However, assuming, but not conceding, that the employee-employer status had been given a locus in California, that fact could have no weight in determining the governmental interest of California in relation to that of Massachusetts. For the contract of employment was made in Massachusetts, and the relationship of employer and employee, consequently, was there created. This relationship continued in existence until the time of Mr. Tator's injury in California. It is this very relationship which gives Massachusetts jurisdiction in cases where injuries are received outside of Massachusetts. This is clear

from the terms of the Massachusetts Act. (App., p. iv.)* As stated by the California Supreme Court, in the opinion below, at page 576, "He was employed there, and was subject to the direction of officers of the employer there located." Consequently, even if it be conceded that the employee-employer relationship had been given a locus in California, it appears that the relationship created under the Massachusetts Act still existed at the time of injury, and this is definitely of great weight in determining the governmental interest of Massachusetts.

V.

FOR THE CALIFORNIA COMMISSION TO ACCORD FULL FAITH AND CREDIT TO THE MASSACHUSETTS STATUTE WOULD NOT BE OBNOXIOUS TO THE PUBLIC POLICY OF CALIFORNIA.

It cannot be considered as of any weight that Mr. Tator, or employees in similar situations, might become dependent upon public charity in California. It is true that this factor was of paramount importance in the case of *Alaska Packers Assn. v. Ind. Acc. Com.*, 294 U. S. 532. But, we deem it of no importance in the present case. (We consider here only those charitable benefits with which a state may be charged, and give no consideration to those benefits received by indigent or disabled persons as the result of private charities.) Under the laws of California, Mr. Tator could not qualify for charitable benefits from the state or the counties thereof. The law of

*Appendix cited is at the end of Brief of Petitioner, dated November 14, 1938.

California is specific in its requirement that the recipient of charitable benefits therefrom be a resident of the state.* Mr. Tator was, and is, a resident of Massachusetts. Consequently, it cannot be claimed that Mr. Tator might become an object of public charity, and that this is an element to be considered in determining the weight of the governmental interests of the two jurisdictions.

The cases cited by respondents, at page 24 of their brief, are far from being pertinent to the questions presented herein. They do not in any way support the contention of respondents that a reversal of the decision of the California Court would, in any way, be obnoxious to the public policy of the State of California. Respondents merely refer to cases considering liquidations and similar subjects, which support nothing other than the proposition that, where the interests of two states are concerned, the full faith and credit provision of the Constitution must be given consideration.

Petitioner believes it unnecessary to again cite cases to show that, even if no substantive defense under the applicable law of a foreign state is concerned, any casual or minor interest of the forum is not sufficient to make the application of the statute

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*At the time of Mr. Tator's injury, the following statute was in effect, (Calif. Stats. 1933, p. 2005):

"Sec. 1. Every county and every city and county shall aid and relieve all able-bodied indigent persons and those indigents incapacitated by age, disease or accident, *when such indigent persons are residents of the county*, and are not supported and relieved by their relatives or friends or by public or private institutions. Work may be required of an able-bodied indigent as a condition of relief. Such work shall be created for the purpose of keeping the indigent from idleness and assisting in his rehabilitation and the preservation of his self-respect." (Italics ours.)

This section has since been incorporated in the California Welfare and Institutions Code (Calif. Stats. 1937, p. 1406), without material change.

of the foreign jurisdiction obnoxious to the public policy of the forum. For the application of the foreign statute to be obnoxious to the policy of the forum, there should be something injurious to the interests of the forum, something of some magnitude. The fact that physicians or hospitals might have to pursue their legal remedies in some other jurisdiction is not such an interest.

Consistent with the reasoning of respondents, it would follow that whenever the laws of two jurisdictions come in conflict, the law of the forum would prevail, since it would only be necessary for that Court to say that it would be obnoxious to the public policy of the forum to follow the law of the foreign state, even though that law constituted a substantive, constitutional defense to the action. Full faith and credit would never be accorded the statutes of foreign states in the case of industrial injuries, because in the case of every industrial injury medical treatment is necessary. This is so even if the injury results in death, as there must be a pronouncement of death.

We ask: What if an employee, under the same facts as present in this case, died in California from an infectuous condition induced by an industrial injury suffered in California, and his widow filed a claim for compensation benefits in Massachusetts. Would it be said, because California doctors and undertakers had bills outstanding in California, that the widow could only prosecute her claim in California and no faith and credit would be given the law of Massachusetts?

VI.

DECISION OF THE CALIFORNIA COURT IS NOT ECONOMICALLY SOUND.

Respondents argue that the decision of the California Supreme Court is economically sound. The reasoning of respondents is illogical. Among other things, they forget that Mr. Tator's employer had several branches in places other than California. (R. 64,) No better expression of the point contended for by petitioner in this respect has ever been given than that by Professor Beale, in his article entitled "Social Justice and Legal Costs—A Study in the Legal History of Today", 49 Harvard Law Review 593. At page 605 thereof he says:

> "If an employer carries on industry in two states and is obliged to insure in each against loss, his wares bear a double burden and he will hardly be able to set his sales price as low as it should be in the competition with other manufacturers. In the case of Bradford Electric Light Co. v. Clapper, particularly, we have a small electric light company carrying on business in two towns which happen to be in separate states. If the company must insure in each state, it must insure all its workmen in each, because any one of them is liable to be sent from one state to the other. It must therefore pay two premiums of insurance and will be obliged to include both in the cost of producing electricity; the rates in the two towns will therefore be higher than they should be, with a resulting economic loss. It is clearly contrary to the policy of society to have its prices unnecessarily raised. It is therefore in accordance with the policy of

both states that one insurance policy should cover the risk. An insurance policy is granted in the terms of the compensation act of the state in which it is taken out, and therefore the policy taken out in Vermont would cover occupational injury to every workman, whether he works in Vermont or in New Hampshire. An enforcement of the obligation to respect the provisions of the Vermont law can therefore be fixed upon New Hampshire not because of any general requirement that New Hampshire should respect the statutes of Vermont, but on the ground that public policy requires *in this particular* case a respect for the statutes of Vermont on account of the economic loss that will occur if that respect is not given. It seems, therefore, that we must qualify the reasoning of Mr. Justice Brandeis by adding this requirement of justice and fair dealing to his enforcement of full faith and credit for the Vermont statute."

This language of Professor Beale, we believe, accurately sets forth the economic dangers which will result from decisions such as the Supreme Court of the State of California has rendered in the present case.

Respondents argue that one policy of insurance will cover liability in every state. Perhaps this is true, but it is also true that separate endorsements must be attached to each such policy for every state to which coverage is extended. It is common knowledge that every extension of coverage must be paid for. Respondents say that petitioner would be enabled to assess premiums on the basis of Mr. Tator's payroll

while he was in California, and that such payrolls were available to petitioner. This we do not understand. How were such payrolls available to petitioner in California when Mr. Tator's salary was carried on the Massachusetts payroll of his employer, and his salary and expenses, if charged at all to the California branch, would be a mere matter of Massachusetts bookkeeping? There is no proof that Mr. Tator's name was ever on the payroll of the Oakland branch.

The fact that the employer was licensed to do business in California is of no moment. Respondents have shown no contractual obligation, or otherwise, in connection therewith, which covers any liability, limited or unlimited, for compensation.

Certainly, there is no showing that, economically, California requires any consideration.

It is respectfully submitted that the decision of the Supreme Court of the State of California should be reversed.

Dated, San Francisco, California,
November 28, 1938.

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